No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB (a corporation) and BJARNE ERIKSEN (an individual),

Appellants,

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY (a corporation),

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
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Proctors for Appellants and Petitioners.

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Of Counsel.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants herein respectfully petition for a rehearing of the above cause upon the following ground:

That two vital questions determinative of the case, fully argued and briefed by counsel, were apparently overlooked by the court and have not been decided, namely:

1. That plaintiff is not entitled to recover without repaying or offering to repay the $290,000 which C.

Henry Smith advanced from his own funds for the original purchase of the vessel (Appellants' Opening Brief, pp. 35-42; Reply Brief, pp. 12-16.)

2. That the trust which plaintiff is seeking to enforce is one illegal under the Norwegian law to which the vessel is subject, and the transfer which the plaintiff seeks to compel is prohibited by that law (Appellants' Opening Brief, pp. 42-50; Reply Brief, pp. 16-20).

Both of these questions are decisive of the case. Neither of them was decided by this court.

Argument.

Appellants, in their opening brief, after stating the facts and after endeavoring to show that the sole ground on which a receivership was asked was shown not to exist, made three main points for the reversal of the decision. The first was that the defendants were bona fide purchasers for value and without notice (Appellants' Opening Brief, pp. 26-34; Reply Brief, pp. 6-11). The other two points were the two points above referred to, which need not be repeated.

In stating the facts of the case, the court clearly recognized that these two last points were involved. We quote briefly from portions of the opinion (pp. 5-7):

> "That Smith did purchase her from her then Japanese owners, as before stated, but instead of mortgaging the ship to obtain a portion of the purchase price, he actually paid the full purchase price with his own funds; that thereafter the same mentioned individuals, through the instrumentality

> of the plaintiff corporation, paid Smith the $60,000 which they had agreed to contribute toward the purchase price of the vessel, with the exception of which Smith has not been reimbursed to any extent and that the amount of $290,000 paid by him on the purchase price still remains due; * * * that by reason of the facts so alleged Smith had, in case the purchase was in reality for the account of the plaintiff, as alleged in the complaint, an equitable lien upon the vessel for the reimbursement to him of the amount of the purchase price which he had paid and for which he has not been reimbursed: * * * The answer also alleged that the plaintiff has never paid or offered to pay to either Smith or the defendant corporation any part of the purchase money of the vessel advanced by Smith, and it also set up as a separate defense that ever since July 21, 1916, the laws of Norway have made unlawful and prohibit the legal or beneficial ownership of any vessel registered under its laws to be held by one not a citizen of that country, or by a corporation not organized and existing under its laws, any violation of which is made punishable by fine and imprisonment and a forfeiture of the vessel; by reason of which it is alleged the defendants should not be compelled to transfer either the register or beneficial ownership of the vessel to the plaintiff."

The reasoning part of the opinion of the court (pp. 8-13), down to the last paragraph thereof (p. 13), apart from the brief statement that there was no abuse of discretion by the lower court (p. 8), deals solely with *further facts* in the case. It then concludes as follows:

> "The records above referred to, if genuine, very clearly show that Mathiesen held the title to the ship in trust for the plaintiff corporation; and as the defendants, according to their own pleading, knew that he held in trust for somebody, it cannot

be supposed that they would not have ascertained the truth by making inquiry of the trustee, which it does not appear that they did or tried to do. See our own decision in Sternfels v. Watson, 139 Fed. 505; Geyser Marion Gold Min. Co. v. Stark, 106 Fed. 558; Jones v. Williams, 24 Beav. 62.

The order is affirmed."

The above quotation is the *only* ruling on the law points argued by counsel and involved in the case. It disposes, and purports to dispose only, of the contention that upon the facts, so far as they appeared, defendants were bona fide purchasers for value without notice. The other two points were, however, equally important and *far more conclusive* of the case and they were (inadvertently, we feel sure) *ignored* by the court. It is well settled that *"a rehearing will be granted if the court has overlooked material points or decisive authorities duly submitted by counsel"* (*4 Corpus Juris,* 632, and numerous cases there cited). There can be no question but that this requirement is fulfilled in the case at bar. Either of the two points overlooked by the court, if decided in favor of appellants, would necessitate a reversal of the order appealed from irrespective of the ruling on the point which the court *did* purport to decide.

We will now briefly recur to the two points not passed on by the court.

I.

THE PLAINTIFF IS NOT ENTITLED TO RECOVER WITHOUT REPAYING OR OFFERING TO REPAY THE $290,000 WHICH C. HENRY SMITH ADVANCED FROM HIS OWN FUNDS FOR THE ORIGINAL PURCHASE OF THE VESSEL.

It would be futile to reargue a matter which has already been so fully argued (Appellants' Opening Brief, pp. 35-42; Reply Brief, pp. 12-16). The *facts* in regard to the contention were, as already shown, stated by the court, but, in deciding the case, it failed to advert to those facts.

Briefly the situation is that C. Henry Smith bought the vessel for $350,000, *advancing his own funds for that purpose;* that he has only been reimbursed to the extent of $60,000, leaving $290,000 still due and owing; that defendants stand at least in the shoes of Smith and that plaintiff cannot recover without repaying or offering to repay the last named sum, which it has not done. Numerous decisive authorities were cited in support of this conclusion, and it is not one which in our judgment is open to doubt.

We do not argue this point over again. We simply state it, for we believe that the mere statement of it is sufficient to show that it is at least worthy of consideration and determination.

II.

THE TRUST WHICH THE PLAINTIFF IS SEEKING TO ENFORCE IS ONE ILLEGAL UNDER THE NORWEGIAN LAW TO WHICH THE VESSEL IS SUBJECT, AND THE TRANSFER WHICH THE PLAINTIFF SEEKS TO COMPEL IS PROHIBITED BY THAT LAW.

This point also was fully presented (Appellants' Opening Brief, pp. 42-50; Reply Brief, pp. 16-20), and it has not been decided. The Norwegian law on this subject is before the court in pamphlet form and was inserted in full in our briefs. *It plainly prohibits any trust in favor of an American corporation in regard to a Norwegian vessel.* No adequate reply was made by plaintiff to our argument on this point. Hence plaintiff's case wholly fails.

We unhesitatingly state that, in our opinion, the above point is conclusive of the case. Yet it has not been decided and was not even noticed except by a brief reference to it in the statement of facts. Here again it would be undignified to reargue the question at this time.

CONCLUSION.

The above two points are decisive of the case. They must be decided *some* time in the litigation and ought to be decided now, as, if they are well taken, the order appointing a receiver was erroneous. If, on the other hand, they are not decided now, the defendants will be placed at a grave disadvantage in subsequently relying on them. This is self-evident.

We submit that fair play to our Norwegian clients and to us should lead to a rehearing of this case. Otherwise our efforts in the case have gone for naught and we are placed in the unfortunate position of having failed to obtain a decision on vital matters connected with this litigation—matters which, we respectfully submit, are decisive of the case and *should* have been considered, in justice both to our clients and to us.

Dated, San Francisco,
February 14, 1922.

Respectfully submitted,

McCutchen, Olney, Willard, Mannon & Greene,
McClanahan & Derby,

Proctors for Appellants and Petitioners.

Warren Olney, Jr.,
Of Counsel.

Certificate of Counsel.

We, Warren Olney, Jr., and S. Hasket Derby, hereby certify that we are of counsel for the appellants and petitioners in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,
February 14, 1922.

Warren Olney, Jr.,
S. Hasket Derby,
Of Counsel for Appellants and Petitioners.